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No. 90-1281

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

BARRY GLEICHER AND BIOPHARMACEUTICS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the government may use petitioners' familiarity with guidelines issued by the Department of Health and Human Services for processing Medicare/Medicaid claim forms to show that petitioners intentionally completed those forms in a false and misleading manner.

2. Whether the Paperwork Reduction Act's public protection provision, which provides that a person may not be penalized for "failing to maintain or provide information" if the agency's information collection request does not meet the Act's requirements, protects persons who provide false and misleading information from prosecution for fraud and intentionally making false statements.

3. Whether petitioners' convictions must be reversed where a magistrate presided over the jury selection at petitioners' trial after petitioners orally consented to the magistrate's role.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-33a) is reported at 914 F.2d 1514.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1990. Petitions for rehearing were denied on November 9 and 27, 1990. Pet. App. 1a-4a. The petition for a writ of certiorari was filed on February 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Biopharmaceutics, Inc., formerly Patient Medical Systems Corp. (PMS), and Barry Gleicher participated in a fraudulent scheme in which petitioners sold medical equipment to Medicare and Medicaid beneficiaries and then submitted falsified Medicare and Medicaid claims to obtain more reimbursement for the equipment than they were entitled to receive. After a jury trial in the Eastern District of New York, petitioners were convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and three counts of making false representations of material fact on Medicaid claim forms, in violation of 42 U.S.C. 1396(h)(a)(1). In addition, PMS and Gleicher were convicted of three and five counts, respectively, of mail fraud, in violation of 18 U.S.C. 1341, and of six and nine counts, respectively, of making false representations of material fact on Medicare claim forms, in violation of 42 U.S.C. 1395nn(a)(1). PMS was fined a total of $173,000. Gleicher was sentenced to three years' imprisonment, to be followed by five years' probation, and was fined a total of $126,000.

1. The Medicare health insurance program provides federal reimbursement for certain medical expenditures of persons age 65 and older and for certain disabled persons under age 65. See 42 U.S.C. 1395 *et seq.* The Medicaid health insurance program provides shared federal and state reimbursement for certain medical expenditures incurred by qualifying families with dependent children and by aged, blind, needy, or permanently disabled individuals who meet certain financial eligibility criteria. 42 U.S.C. 1396 *et seq.* The two programs overlap with respect to Medicare-eligible individuals who are financially eli-

gible for Medicaid. As to those individuals, the Medicare program determines the amount of reimbursement that is due, and the federal government and the participating State share the responsibility for reimbursement.

The Health Care Financing Administration (HCFA) of the Department of Health and Human Services (HHS) administers Part B of Medicare, which, among other things, provides reimbursement for certain durable medical equipment used in the patient's home. See 42 U.S.C. 1395k(a)(2)(B), 1395x(s)(6). The Secretary of HHS has entered into contracts with 47 "carriers," each of which is responsible for processing and paying Medicare claims in a particular region of the country. Each carrier sets the amount that it will pay for a particular service based on the cost of providing that service in its region. As a result, the amounts that different carriers will pay a provider for the same service differ from area to area. Pet. App. 8a.

HCFA has published the Medicare Carriers Manual (Manual), which provides agency guidance respecting the statute and regulations. The Manual explains the basis on which a carrier or provider of services is to determine which carrier is responsible for reimbursement of a particular claim. The Manual identifies the controlling criterion as "the site where the company met with the beneficiary or received the beneficiary's call." Manual § 3102.B, Pet. App. 133a. In the Medicare field, that criterion is known as the "point of sale." The Manual contains examples (*id.* at 134a-137a) demonstrating the straightforward application of the point-of-sale criterion: if a sale occurs in person at or by telephone from an office of the provider, then the carrier for

the region encompassing that office is the carrier responsible for reimbursement, regardless of where the medical equipment is delivered from or to, or where the billing or other paperwork is handled; similarly, if the sale is made in person at the patient's home or in a medical facility, the location where that sale was made determines the responsible carrier, irrespective of the other aspects of the sale. Pet. App. 8a-9a.

2. In February 1983, a company known as Health-Med, Inc. began selling durable medical equipment and disposable medical supplies to Medicare beneficiaries. Health-Med had its offices at 222 Franklin Avenue, Franklin Square, New York. Steven B. Weiss was president of Health-Med. He met petitioner Gleicher in August 1983, and they established a second corporation, PMS, at the same Franklin Square address to engage in the same line of business. Health-Med went out of business in 1984 and its operations and employees were assumed by PMS. Gleicher and Weiss were vice-presidents of PMS; Gleicher also was PMS's treasurer. Pet. App. 11a-12a.

PMS and Health-Med sold seat-lift chairs and submitted claims for reimbursement on Form 1500, a claim form developed by HCFA. See Pet. App. 56a.[1] One of the blanks to be filled out on Form 1500 by

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[1] Form 1500 is subject to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, which requires that all "information collection requests" be submitted to the Director of the Office of Management and Budget for review. See 44 U.S.C. 3507(a). See generally *Dole* v. *United Steelworkers of America*, 110 S. Ct. 929 (1990). When the Director approves an information collection request, he gives it a control number. The Director approved Form 1500 and gave it a control number, which appears in the upper righthand corner of the form. See Pet. App. 56a.

the supplier of medical equipment or other reimbursable services is Box 31, which requests the physician's or supplier's name, address, zip code, and telephone number. The Manual states that the "[n]ame and address information is furnished to help carriers determine whether the physician/supplier of services can qualify for benefit payments, and as an aid in determining jurisdiction and referring the claim to the servicing carrier where appropriate." Manual § 4011.8, Pet. App. 138a.[2]

The 20 substantive offenses charged in the indictment involved the sales of seat-lift chairs to residents of the State of New York, either in person or from the Franklin Square, New York, office. Although petitioner Gleicher and co-defendant Weiss understood that their claims should have been submitted for reimbursement to the New York medicare carrier, Blue Cross and Blue Shield of Greater New York (N.Y. Blue Cross), petitioners instead submitted the claims to carriers elsewhere in the country that offered a higher reimbursement rate than the New York carrier.[3]

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[2] The version of the Manual included in the petition appendix refers to "item 8" as the location of the address information. Pet. App. 138a. As the court of appeals recognized, however, it was clear to those working with the Manual that the reference on Form 1500 was to Box 31. Pet. App. 25a.

[3] The indictment charged that, as part of the conspiracy to commit mail fraud, petitioners submitted in excess of four hundred misdirected claims to carriers outside New York. Pet. App. 42a. Six substantive counts of mail fraud involved claims misdirected to the Ohio carrier, *id.* at 44a-46a, and three substantive counts of mail fraud involved claims misdirected to the Illinois carrier, *id.* at 47a-48a. Six counts of Medicare fraud involved claims submitted to the Ohio carrier, *id.* at 49a-50a, and two counts involved claims submitted to

Testimony at trial showed that both Gleicher and Weiss were familiar with the standards for determining the appropriate carrier and that they nevertheless directed the claims to carriers far removed from the point of sale, including the New Jersey carrier (N.J. Prudential), the Ohio carrier (Ohio Nationwide), and the Illinois carrier (Illinois Blue Cross). Pet. App. 12a-19a.[4] A government auditor calculated that petitioners received approximately $200,000 more than they would have received if the claims had been billed to the New York carrier. *Id.* at 19a-20a.

2. On appeal, petitioners contended that the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, barred their prosecution. They argued that the Manual itself was an "information collection request" under the Act, that the Director of the Office of Management and Budget (OMB) had not approved the Manual, and that the Manual therefore could not be used to collect information. See 44 U.S.C. 3507(a). They further argued that their prosecution was barred by the Paperwork Reduction Act's "public

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the New Jersey carrier, *id.* at 51a-52a. Finally, three counts of Medicaid fraud involved claims sent to the New York Medicaid carrier for reimbursement of the state-funded share of an inflated reimbursable amount that was achieved by initially processing such claims through an improper out-of-state Medicare carrier. *Id.* at 53a-55a.

[4] In addition to the guidance provided by the Manual, the carriers themselves send bulletins to medical equipment providers explaining the application of the regulations. The evidence showed that petitioners had received direct correspondence from carriers explaining the point-of-sale criterion and informing petitioners that they were misdirecting claims to carriers that were located in regions that did not encompass the point of sale. See Pet. App. 9a-10a, 13a, 14a, 16a, 18a.

protection" provision, which states that "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved * * * does not display a current control number," which establishes that OMB has reviewed and approved the request. 44 U.S.C. 3512.

The court of appeals assumed, without deciding, that the Manual was an "information collection request" governed by the Act, but rejected petitioners' contention. The court explained that petitioners were not being punished for "failing to * * * provide information" within the meaning of the public protection provision, 44 U.S.C. 3512, but rather for knowingly providing false information. Moreover, the court observed that the Director had approved Form 1500, which required an accurate statement of address. Pet. App. 21a-22a. See note 1, *supra*. The court noted that this case "stands in sharp contrast" to *United States* v. *Smith*, 866 F.2d 1092 (9th Cir. 1989), where a defendant successfully invoked the "public protection" provision in a prosecution for failure to submit a plan of operation before conducting mining operations on federal land. Pet. App. 22a-24a.

The court of appeals also rejected petitioners' assertion that the district court erred in allowing a magistrate to preside over jury selection. Petitioners argued that magistrate supervision was unlawful in light of this Court's decision in *United States* v. *Gomez*, 109 S. Ct. 2237 (1989), even though their counsel consented to the magistrate's performing that function. The court of appeals held that express consent to the magistrate's role in jury selec-

tion barred them from raising that claim on appeal. Pet. App. 33a.[5]

ARGUMENT

1. Petitioners argue (Pet. 9-24) that their convictions violated due process. They premise that argument on the claim that "the indictment and prosecution were based on violations of the point of sale rules contained in the carrier's Manual." Pet. 9. Petitioners contend that the Manual's "rules" cannot have the force and effect of law because they were not promulgated as legislative rules under the Administrative Procedure Act (Pet. 11-14), and that as mere interpretative rules they cannot provide the basis for a prosecution (Pet. 14-17). Petitioners' underlying premise is wrong, and their petition misstates what this case is about.

As the court of appeals explained, petitioners were convicted of participating in a fraudulent scheme and making false statements. The offense of conspiracy to use the mails for the purpose of executing a scheme to defraud (Count 1) did not depend on whether the Manual established any criminally enforceable rules or regulations. Rather, petitioners committed the offense by supplying what they knew was false and deceptive information to the carriers and the United States to obtain excessive reimbursement on their Medicare and Medicaid claims. Similarly, petitioners

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[5] The court of appeals also rejected various contentions that petitioners raised on appeal but do not reassert here, including arguments that the prosecutor made inflammatory and prejudicial comments, Pet. App. 27a-31a; that PMS was improperly precluded from using a particular document to impeach a witness, *id.* at 32a; and that Gleicher was not sufficiently connected with Health-Med to be liable for false statements made in Health-Med claims, *id.* at 32a-33a.

committed the substantive mail fraud offenses (Counts 2-7) and the offenses of making false representations of material fact on Medicare/Medicaid forms (Counts 8-21) by knowingly supplying false information with the intent to deceive for monetary gain.

The Manual was used as evidence at trial, together with the testimony of witnesses from the carriers, Health-Med and PMS, to show that petitioners knowingly and falsely completed the address box on the Medicare claim form with the intention of defrauding the carriers and the United States. The evidence showed that (1) petitioners understood that the claims they submitted to non-New York carriers should have been submitted to New York carriers; (2) petitioners knew that the address information petitioners provided in Box 31 of Form 1500 was known to be false and misleading in light of the information they knew they were expected to provide in that Box; and (3) petitioners were aware that in each case the carrier would rely on the address provided in Box 31 to ascertain whether the point of sale was within its jurisdiction and whether it should pay the claim. See Pet. App. 11a-20a.

Petitioners mistakenly describe the Manual as if it were a criminally enforceable statute or regulation. They argue that they did not, technically, violate any provision of the Manual because the Manual is directed at carriers, not providers (Pet. 18), and that the Manual, strictly construed, does not require a provider to file its claim initially with the responsible carrier but allows the carriers themselves to ascertain who is the responsible carrier (Pet. 19-21). Petitioners also argue (Pet. 21-24) that the Manual is unconstitutionally vague if it purports to establish

criminally enforceable rules. All of those arguments are irrelevant to this case because petitioners were not convicted of "violating" the Manual. The government proved, instead, that petitioners sought to defraud the Medicare and Medicaid programs by making false and misleading statements to obtain excessive payments.[6]

2. Petitioners argue (Pet. 24-28) that the public protection provision of the Paperwork Reduction Act prohibits this prosecution because the Manual constituted an "information collection request" that did not receive OMB approval under the Act. See 44 U.S.C. 3512. Petitioners assert (Pet. 27) that they therefore "were entitled to ignore" the Manual when completing Form 1500. This Court need not decide whether the Manual is an "information collection request"—an issue that the court of appeals did not resolve, see Pet. App. 21a—because, even if that were the case, the public protection provision would not shelter petitioners from this prosecution. By its terms, that provision protects the public from penal-

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[6] Petitioners cite remarks made at a separate civil trial to convey the impression that the criminal prosecution depended on a showing that petitioners violated rules established by the Manual. Pet. 7-8. As counsel for PMS himself explained in the civil case, however, "in the criminal trial the government took the position that the validity of the provisions was not the—the linchpin was not what the case was all about." Pet. App. 82a. The petition contains other misstatements of the record. For example, petitioners state that the carriers gave conflicting instructions on how to determine the appropriate carrier for processing Medicare claims. Pet. 5. The evidence showed, however, that all of the carriers involved in this case applied the point-of-sale criterion in the same manner. Pet. App. 12a-19a. Petitioners also state that this prosecution was undertaken in "response" to petitioners' civil suit. Pet. 6. That assertion is without foundation.

ties for "failing to maintain or provide information to any agency" if the information collection request has not been approved under the Act. 44 U.S.C. 3512. As the court of appeals explained, petitioners were not prosecuted for failing to provide information, but rather for fraudulently providing false information. Pet. App. 20a-26a.[7]

Petitioners state (Pet. 28) that OMB itself has determined that the Manual cannot be the basis of a requirement for the disclosure of information on Form 1500. The OMB letters on which petitioners rely, however, Pet. App. 87a-91a, do not state that individuals have license to complete Form 1500 in a false or misleading manner. Accepting, arguendo, petitioners' view that "the public is entitled to rely solely on that form to contain all information collec-

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[7] The situation is analogous to that in *Dennis* v. *United States*, 384 U.S. 855 (1966), where the Court held that a person convicted of conspiring to defraud the United States by filing false non-Communist affidavits with the National Labor Relations Board could not contest whether it was lawful to require the filing of truthful non-Communist affidavits. The Court stated: "This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional." 384 U.S. at 867. Similarly, in *Kay* v. *United States*, 303 U.S. 1 (1938), the Court upheld a conviction for making false statements in connection with the Home Owners' Loan Act of 1933 without allowing a challenge to the constitutionality of the statute. The Court stated: "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction." 303 U.S. at 6. In this case, as in *Dennis* and *Kay*, petitioners were not prosecuted for failing to comply with an allegedly unlawful governmental directive. Rather, they were convicted for knowingly and fraudulently providing false information.

tion requests and reporting requirements," Pet. 28, this is not a case in which Medicare providers rely in good faith on the form and are then held accountable for not complying with the Manual. Rather, the evidence showed that petitioners knowingly made false statements on the forms and used knowledge obtained in part from the Manual to perpetrate their fraud. Pet. App. 19a.

Petitioners cite no decision holding that the public protection provision bars a prosecution for providing false information. They rely (Pet. 27) on *United States* v. *Hatch*, 919 F.2d 1394 (9th Cir. 1990), and *United States* v. *Smith*, 866 F.2d 1092 (9th Cir. 1989), to support their position. In both cases, however, the defendant was convicted of working a mining claim in a National Forest without having first filed a plan of operations with the Forest Service. In both cases, the court reversed a conviction because the Forest Service regulation requiring the filing of such a plan had not been approved by OMB under the Act. Each case involved a prosecution for "failing to * * * provide information" of the sort covered by the public protection provision; neither case suggested that the provision would apply to a prosecution for making a false filing. See Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. Legis. 1, 77 n.411 (1987) ("The Public Protection provision at most only protects a person from penalties for *failing* to file information. It does not protect one who files information which is false.").

3. Relying on *United States* v. *Gomez*, 109 S. Ct. 2237 (1989), petitioners argue (Pet. 29-30) that the magistrate lacked statutory jurisdiction to preside over the jury selection process without petitioners' written consent. The court of appeals held that peti-

tioners were precluded from raising that contention because they had failed to lodge any objection before the magistrate, and indeed had orally consented to the magistrate's role. By contrast, the petitioner in *Gomez* had specifically objected to the magistrate's action.

In *United States* v. *France*, 111 S. Ct. 805 (1991), the Court considered whether an objection to magistrate supervision of juror selection may be raised on appeal when there is a failure to object before the magistrate. The judgment of the court of appeals in *France* was affirmed by an equally divided Court. That issue is again before the Court in *Peretz* v. *United States*, No. 90-615 (set for argument April 23, 1991). In *Peretz*, as in this case, there was actual consent to the role of the magistrate in the jury selection process rather than mere failure to object. The petition accordingly should be held for disposition in light of the Court's decision in *Peretz*.

CONCLUSION

The petition for a writ of certiorari should be held, and Question 3 should be disposed of in light of this Court's decision in *Peretz* v. *United States*, No. 90-615. In all other respects, the petition should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

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